

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ALBERT RHEA and GARY SCHOONOVER,)

Plaintiff,)

vs.)

No. 04-2554MLV

DOLLAR TREE STORES, INC, DONNA)

CARLO, JIM STEPHENS, and STEVE)

McDONNELL,)

Defendant.)

ORDER GRANTING PLAINTIFFS' MOTION TO AMEND COMPLAINT

Before the court is the July 26, 2004 motion of the plaintiffs pursuant to Rule 15 of the Federal Rules of Civil Procedure for leave to amend their complaint to add six additional factual allegations to their complaint. The defendants oppose the amendment on the grounds that the amendment would be futile because the plaintiffs did not exhaust their administrative remedies as to a sex-stereotyping claim and did not timely file a lawsuit setting forth a sex-stereotyping claim. The motion was referred to the United States Magistrate Judge for determination.

Rule 15(a) provides that leave to amend a pleading "shall be freely given when justice so requires." Under Rule 15(a), the court has some discretion in allowing amendments. Factors to consider include prejudice to the opposing party, delay, and futility of amendments. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

On January 13, 2004, both plaintiffs filed charges of

discrimination with the Equal Employment Opportunity Commission ("EEOC"). Both charges alleged:

My store manager, [sic] made statements in front of other company employees about my sexual orientation and my relationship with another employee as well as referred to me using profane language. Since that time, my terms and condition of employment have been different from other employees. I believe that I have been discriminated against because of my Sexual Orientation in violation of Title VII

(Def.' Mem. in Opp. to Pls.' Mot. to Amend, Exs. A and B.) In addition, both plaintiffs checked boxes on their complaint forms indicating that they were discriminated against based on "sex."

(*Id.*) On January 14, 2004, the EEOC issued a Dismissal and Notice of Rights to sue. Thereafter, on April 12, 2004, the plaintiffs filed the present employment discrimination complaint against the defendants alleging violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq., violation of the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101 et seq., defamation, intentional economic harm, breach of contract, retaliatory discharge, and civil conspiracy. The complaint alleges that the plaintiffs were "subjected to adverse employment action based upon their sexual orientation" in violation of Title VII of the Civil Rights Act.

(Compl. at ¶ 24.)

The plaintiffs now seek to amend their complaint to allege the following additional facts to supplement the factual allegations in the original complaint:

1. Carlo constantly used language and actions towards

the Plaintiffs regarding their sex, and their gender non-conforming behavior and appearance. Carlo repeatedly made comments and did acts such as:

- a. "You got a hair cut. Your [sic]looking more like a man now."
- b. When Schoonover bleached his hair, Carlo stated, "Oh, your [sic] trying to copy me."
- c. "I might know somebody I can set you up with."
- d. "For a couple of gay guys you do a good job."
- e. "I've got a Valium if you need to calm down."
- f. "For a couple of gay guys, you're okay."
- g. Holding the door open for them.

2. After making their initial complaints to Stephen and McDonnell, Schoonover was promoted to assistant store manager, and then Carlo told him if he wanted to keep his job, he needed to keep his mouth shut about sexual harassment.

3. When Schoonover was transferred to another store, the new store manager in Southhaven, Mississippi, Carol Woodard, told him, regarding his pink shirt, that "pink is okay for a queer."

4. The Defendant [sic] repeatedly made complaints to Stephens, McDonnell, and Dollar Tree's human resources department all to no avail. Neither Stephens nor McDonnell returned the Plaintiffs' calls, and when seeing the Plaintiffs in a store, they would not talk to the Plaintiffs about their complaints.

5. Stephens and McDonnell turned a blind eye to Carlo's actions, and gave tacit approval of said actions. Stephens and McDonnell never investigated the Plaintiffs' complaints, and in fact, caused the Plaintiffs to have their hours reduced, and placed the Plaintiffs in situations that led to their termination from Dollar Tree.

6. Dollar Tree's Human Resources office, including Chris Nygren, merely transferred the Plaintiffs to other locations "to put an end" to the Plaintiffs' complaints, not the harassment itself."

(Pls.' Mem. of Law Supp. Pls.' Mot. to Amend Compl. at 4-5.) The plaintiffs assert that the "amended complaint will address the

technical aspects of the pleading and will allege additional facts to show that the Defendants [sic] are entitled to relief." (*Id.* at 6.) They further assert that the facts alleged in the original complaint were sufficient to put the defendants on notice of a Title VII claim even though the exact language of the statute, that is "sex," was not used. (*Id.*)

The defendants have filed a motion to dismiss the original complaint for failure to state a claim. The basis of their motion to dismiss is that the facts alleged in the plaintiffs' complaint are not sufficient to give rise to a claim of sex-stereotyping based on the plaintiffs' gender but merely relate to their "sexual orientation." The defendants point out that a "sexual orientation" claim differs from a "sex-stereotyping" claim. (*Id.* at 6.) The defendants argue that the proposed facts which would be included in an amended complaint likewise fail to state a claim of sex-stereotyping, and therefore an amendment would be futile.

A person filing a lawsuit for violation of Title VII of the Civil Rights Act must first exhaust administrative remedies by filing a charge of discrimination with the EEOC. 42 U.S.C. § 2000e-5(e)(1). A lawsuit alleging violation of Title VII is limited to the allegations in the EEOC charge and all claims which could be expected to arise out of the charge. *Haithcock v. Frank*, 958 F.2d 671, 675 (6th Cir. 1992). In order to exhaust administrative remedies, a plaintiff need not conform to legal

technicalities or use the exact wording which might be required in a judicial pleading. *Jones v. Sumser Retirement Village*, 209 F.3d 851, 853 (6th Cir. 2000).

To state a Title VII claim of sexual harassment, the plaintiff must show that the harassment was "based on sex." *Yeary v. Goodwill Indus-Knoxville, Inc.*, 107 F.3d 443, 447-48 (6th Cir. 1997). The critical issue in a sexual harassment claim is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998). "[H]arassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII." *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000). "[W]hile sex stereotyping may constitute evidence of sex discrimination, '[r]emarks at work that are based on sex-stereotypes do not inevitably prove that gender played a part in a particular employment decision.'" *Id.* at 1085, quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). To state a claim for sex-stereotyping, a plaintiff must show "that failure to conform to certain gender stereotypes was a criteria in an employment decision. (*Id.*) See also *Smith v. City of Salem, Ohio*, 2004 WL 174580 at *5, No. 03-3399 (6th Cir., Aug. 5, 2004)(finding allegations that employee was discriminated against based upon employee's gender non-conforming behavior and appearance

were actionable under Title VII).

After careful review of the plaintiffs' proposed factual amendments, the court finds that the amendments would not necessarily be futile. First of all, some of the proposed factual amendments relate to claims of retaliation, not sexual harassment. Others relate to gender non-conforming behavior. The amendments do not fail on their face for failure to exhaust administrative remedies. Both plaintiffs alleged discrimination based on sex at the EEOC level by checking the appropriate box on the complaint form. Nor does the court find that the amendments would be futile because they untimely assert a claim for sex-stereotyping. To the extent a claim for sex-stereotyping arises out of the same conduct alleged in the original complaint, any amendment would relate back. FED. R. CIV. PRO. 15(c). The amendments will not cause any delay or prejudice, either. This case was just commenced in April of 2004. The defendants can supplement their motion to dismiss to address the new factual allegations.

Accordingly, the plaintiffs' motion to amend is granted. The plaintiffs shall file their amended complaint within ten days of the date of service of this order.

IT IS SO ORDERED this 26th day of August, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE